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COMMISSION ON JUDICIAL PERFORMANCE  
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**REPORT CONCERNING ADOPTION ON OCTOBER 19, 2011  
OF AMENDMENTS TO RULES OF THE  
COMMISSION ON JUDICIAL PERFORMANCE**

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Pursuant to its rule-making authority under article VI, section 18, subdivision (i) of the California Constitution, on April 14, 2011, the Commission on Judicial Performance circulated an invitation to comment on interim amendments to certain of its rules. Following consideration of the comments received, the commission further amended the interim rules, as summarized below. The amendments were adopted at the commission's October 2011 meeting. The text of each amendment is attached and the final version of the amended rules may be found on the commission's website at [www.cjp.ca.gov](http://www.cjp.ca.gov).

**I. EXPLANATION OF AMENDMENTS**

**A. Amendments to Rules 114(b) and 116(b) Concerning Newly Presented Evidence**

A brief summary of the commission's preliminary investigation process is provided for purposes of explaining the amendments to rules 114(b) and 116(b). If the commission initiates a preliminary investigation, the judge is notified of the investigation and the specific nature of the allegations, and given an opportunity to respond. The judge's response may include documentary support including transcripts, letters and witness declarations. Upon receipt of the judge's response, further investigation is typically conducted by commission staff. After the preliminary investigation has been completed, the commission may (1) close the matter, (2) issue an advisory letter, (3) issue a notice of intended private admonishment, (4) issue a notice of intended public admonishment, or (5) institute formal proceedings. When a judge receives a notice of intended private or public admonishment, the judge may accept the admonishment, demand an appearance before the commission to object to the admonishment, or demand formal proceedings. The amendments to rules 114(b) and 116(b) pertain to the proceedings when a

**judge elects to appear before the commission to object to the issuance of a notice of intended private or public admonishment instead of demanding formal proceedings.**

**A notice of intended private or public admonishment generally is issued only when, based upon the judge's response to the preliminary investigation, an evidentiary hearing does not appear to be required because the material facts do not appear to be disputed. If a judge who receives a notice of intended admonishment disputes the proposed findings, the judge has the right to demand formal proceedings, which include a full evidentiary hearing with attendant due process protections. The appearance before the commission pursuant to rules 114(b) and 116(b) to object to the proposed admonishment is intended to provide the judge with an opportunity to informally address the commission and argue for a lower level of discipline or no discipline at all based on the undisputed facts. In contrast to formal proceedings, the appearance is not public, witnesses are not called to testify, and documents are not admitted into evidence. Typically, an appearance is conducted without an examiner or prosecutor. In opting for an appearance, the judge agrees to waive formal proceedings and Supreme Court review in exchange for the commission's agreement that it will not impose a higher level of discipline than indicated in the notice of intended admonishment. That agreement is premised on the commission having knowledge of all material facts at the time it issues the notice of intended admonishment.**

**Although the appearance process is not intended to be a forum for the introduction of evidence or for contesting disputed facts, a number of judges have submitted new evidence in the form of witness declarations, documents and letters during the appearance process. This presents problems because the newly presented information often raises factual issues that were not previously presented to the commission and not investigated by the commission during the preliminary investigation. Factual questions and disputes cannot be resolved at an appearance because it is not an evidentiary hearing. The commission must have authority to corroborate and fully investigate all information presented and relied on in its decisions. The amendments to rules 114(b) and 116(b) were adopted to address these problems.**

**Under the amendments, factual information that was not previously presented to the commission during the preliminary investigation will not be considered during the appearance process except under limited circumstances (where material information could not have been discovered with due diligence during the preliminary investigation or when offered to correct an error of fact). When new factual information meets the criteria for consideration, the amended rules permit the commission to conduct further investigation based on the new information. Following further investigation of the new information, the commission may proceed with the appearance process or withdraw the intended admonishment and proceed with the preliminary investigation.**

**The commission received 16 comments in response to its invitation to comment on the interim amendments. One was from attorneys Joseph P. McMonigle and Kathleen M. Ewins of Long & Levit LLP; the rest were from California judges. All comments were in opposition to the interim amendments. The commission considered each of the comments submitted. Amendments to the interim rules were adopted in response to many of the comments. However, the commission remains of the view that the adoption of rules addressing the submission of new**

factual information during an appearance to object to a notice of intended admonishment is necessary and appropriate.

Many of the comments expressed the view that judges are in a better position to present information to the commission after determining what alleged incidents of misconduct are included in the notice of intended admonishment. A judge is informed of all the allegations included in a preliminary investigation in specific detail and given an opportunity to respond before the commission votes to impose discipline. This is the appropriate time in the process for the judge to investigate *all* allegations in the preliminary investigation and provide the commission with *all* relevant evidence. Extensions of time to provide a response are routinely granted upon a showing of good cause. It is critically important that the commission have all relevant information when the commission is reviewing the preliminary investigation and making an initial determination regarding the disposition of the matter.

Other comments stated that judges may not want to contact all witnesses during the preliminary investigation due to the judge's desire to keep the existence of the investigation confidential. In the commission's view, a judge's failure to fully investigate all allegations included in the preliminary investigation based on a desire to keep the existence of the investigation confidential is misguided. The commission's rules clearly provide that a preliminary investigation may result in the issuance of a notice of an intended public admonishment or the institution of formal proceedings which are open to the public. (Rules 115, 118.) Not responding fully to the commission's investigation is not likely to keep the matter from becoming public.

Many comments expressed concern about the provisions that would permit the commission to withdraw an intended admonishment and proceed with the preliminary investigation following the consideration of new evidence. This provision is not intended to deter judges from demanding an appearance. Rather, it is included to ensure that the commission's decisions are based on full and accurate information. The commission cannot accept factual representations without determining their reliability. If the further investigation uncovers information that leads the commission to conclude that the misconduct may be more serious than initially thought, it must have the option of withdrawing the notice of intended admonishment and proceeding with the preliminary investigation. In that event, all rights previously waived by the judge are reinstated, so that all rights and options under the commission's rules and the Constitution are available to both the judge and the commission.

Some of the comments appear to be based on the mistaken assumption that the amendments prevent a judge from presenting evidence at an evidentiary hearing. In order to eliminate any possible ambiguity with respect to the non-evidentiary nature of the appearance process, the amended rules expressly state that an appearance before the commission is not an evidentiary hearing. Further, the commission has amended language in rules 114, 116 and 108 (extension of time) to delete language stating that an appearance before the commission is to "contest" an intended admonishment to avoid any possible implication that the appearance is a contested hearing. The language has been amended to state that a judge may demand an appearance before the commission to "object" to the intended admonishment. Similar amendments have been made to pertinent policy declarations.

**B. Amendment to Rule 111.5 – Correction of Advisory Letter**

Pursuant to rule 111.5, a judge who receives an advisory letter may, within 30 days, apply to the commission for correction of an error of fact or law. The amendment provides that factual representations, including documents, letters, and witness statements, will be considered only if relevant to the question of whether the advisory letter contains an error of fact. The purpose of rule 111.5 is to correct errors in an advisory letter, and not to provide a second opportunity to present new facts and argument. (See policy declaration 2.1.5.) As such, the rule was amended to clarify that only factual information that is relevant for the purpose of correcting an error of fact will be considered.

The comments discussed above with reference to rules 114(b) and 116(b) also referenced the proposed amendments to rule 111.5. The substance of the comments did not make a distinction between an appearance to object to a notice of intended admonishment and an application for correction of an advisory letter.

The adopted amendment to rule 111.5 does not include the provision included in the interim rule that authorized the commission to reopen its investigation and impose a higher level of discipline. Upon consideration of the comments received, the commission concluded that the provision was not necessary in the procedural context of an application for a correction of an advisory letter.

## TEXT OF AMENDED RULES

### AMENDMENTS TO INTERIM RULE 114(b)

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**(b) (Appearance before the commission)** The judge may, within 30 days of the mailing of a notice of intended private admonishment, file with the commission a written demand for an appearance before the commission to ~~contest~~object to the intended private admonishment, and waive the right to formal proceedings under rule 118 and to review by the Supreme Court. A judge who demands an appearance before the commission to ~~contest a notice of intended private admonishment~~ shall, within 30 days of the mailing of the notice of intended private admonishment, submit a written statement of the basis of the judge's objections to the ~~commission's proposed admonishment~~. ~~The statement shall include the basis of the judge's objection.~~

After the time set for the appearance before the commission, the commission may:

- (1) Close the matter without disciplinary action;
- (2) Close the matter with a confidential advisory letter; or
- (3) Issue a private admonishment.

If the commission determines to issue discipline after an appearance under this rule, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.

An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (2) that the information (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, or (2) offered to correct an error of fact in the notice of intended private admonishment. ~~If the commission determines that the new facts should be considered, the commission may withdraw the notice of private admonishment and proceed with the staff inquiry or preliminary investigation in order to investigate the new factual information. Following such further preliminary investigation, the commission may close the matter, issue an advisory letter or impose any discipline authorized by commission rules and article VI, section 18 of the California Constitution.~~

When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information. Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section or withdraw the intended admonishment and proceed with the preliminary investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of the preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.

~~\_\_\_\_\_ If the commission determines to issue discipline, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.~~

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## AMENDMENTS TO INTERIM RULE 116(b)

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**(b) (Appearance before the commission)** The judge may, within 30 days of the mailing of a notice of intended public admonishment, file with the commission a written demand for an appearance before the commission to ~~contest~~object to the intended public admonishment, and waive the right to formal proceedings under rule 118 and to review by the Supreme Court. A judge who demands an appearance before the commission to ~~contest~~ a notice of intended public admonishment shall, within 30 days of the mailing of the notice of intended public admonishment, submit a written statement of the basis of the judge's objections to the commission's proposed admonishment. ~~The statement shall include the basis of the judge's objection.~~

After the time set for the appearance before the commission, the commission may:

- (1) Close the matter without disciplinary action;
- (2) Close the matter with a confidential advisory letter;
- (3) Issue a private admonishment; or
- (4) Issue a public admonishment.

If the commission determines to issue discipline after an appearance under this rule, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.

An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (2) that the information(b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, or (2) offered to correct an error of fact in the notice of intended public admonishment. ~~If the commission determines that the new facts should be considered, the commission may withdraw the notice of public admonishment and proceed with the staff inquiry or preliminary investigation in order to investigate the new factual information. Following such further preliminary investigation, the commission may close the matter, issue an advisory letter or impose any discipline authorized by commission rules and article VI, section 18 of the California Constitution.~~

When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information. Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section

or withdraw the intended admonishment and proceed with the preliminary investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of the preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.

~~—— If the commission determines to issue discipline, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.~~

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## **AMENDMENT TO INTERIM RULE 111.5**

A judge who receives an advisory letter under either rule 110(c) or rule 111(c) may, within 30 days of the mailing thereof, apply to the commission for correction of an error of fact or law or both. The application shall be determined by the commission without an appearance by the judge before the commission unless the commission determines otherwise.

~~Factual representations or information, including documents, letters, or witness statements, will be considered only if the factual information is relevant to the question of whether the advisory letter contains an error of fact. not previously presented to the commission during the staff inquiry or preliminary investigation will not be considered unless it is shown that the new factual information is (1) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (2) that the information could not have been discovered and presented to the commission with reasonable diligence during the staff inquiry or preliminary investigation. If the commission determines that the new facts should be considered, the commission may withdraw the advisory letter and proceed with the staff inquiry or preliminary investigation in order to investigate the new factual information. Following such further staff inquiry or preliminary investigation, the commission may close the matter, issue an advisory letter or impose any discipline authorized by commission rules and article VI, section 18 of the California Constitution.~~

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## **AMENDMENT TO RULE 108(e)**

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**(e) (Other extensions of time)** Any other or further extension of time, other than to demand an appearance before the commission to ~~contest~~object to a private or public admonishment pursuant to rule 114(b) or 116(b), or to demand formal proceedings pursuant to rule 114(c) or 116(c), may be granted by the chairperson only upon a showing of good cause.

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## **AMENDMENTS TO RULE 114 (a) AND (d)**

**(a) (Acceptance of private admonishment)** The judge may choose not to ~~contest~~object to the intended private admonishment. If the judge does not ~~contest~~demand formal proceedings or an appearance before the commission to object to the intended private

admonishment within 30 days after the mailing of a notice of intended private admonishment, the admonishment becomes effective.

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**(d) (Extensions of time)** The 30 days provided to ~~contest-demand formal proceedings~~ or an appearance before the commission to object to an intended private admonishment pursuant to subdivisions (b) and (c) may not be extended. The time for filing a written statement of the judge's objections to the intended admonishment pursuant to subdivision (b) may be extended by the chairperson or the chairperson's designee upon a showing of good cause, if the judge has, within 30 days of the mailing of a notice of intended private admonishment, filed a demand for an appearance with a personal waiver of the right to formal proceedings and to review by the Supreme Court.

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## AMENDMENTS TO RULE 116 (a) AND (d)

**(a) (Acceptance of public admonishment)** The judge may choose not to ~~contest-object~~ to the intended public admonishment. If the judge does not ~~contest-demand formal proceedings~~ or an appearance before the commission to object to the intended public admonishment within 30 days after the mailing of a notice of intended public admonishment, the admonishment becomes effective.

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**(d) (Extensions of time)** The 30 days provided to ~~contest-demand formal proceedings~~ or an appearance before the commission to object to an intended public admonishment pursuant to subdivisions (b) and (c) may not be extended. The time for filing a written statement of the judge's objections to the intended admonishment pursuant to subdivision (b) may be extended by the chairperson or the chairperson's designee upon a showing of good cause, if the judge has, within 30 days of the mailing of a notice of intended public admonishment, filed a demand for an appearance with a personal waiver of the right to formal proceedings and to review by the Supreme Court.

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## AMENDMENTS TO POLICY DECLARATION 2.1

An appearance before the commission to ~~contest-object to~~ the imposition of a proposed private admonishment under rule 114, or to ~~contest-object to~~ the imposition of a proposed public admonishment under rule 116, means an opportunity for a judge to informally ~~contest-object to~~ the imposition of an admonishment in argument before the commission based on the proceedings which resulted in the issuance of a notice of intended admonishment and the judge's statement of objections.

A judge's demand for an appearance after notice of intended private admonishment under rule 114, or notice of intended public admonishment under rule 116, ~~may~~ shall include a written statement of the basis of the judge's objections, ~~both legal and factual~~, to the ~~commission's~~ proposed findings admonishment. The judge's statement ~~may include points and authorities in support of any legal arguments and verified statements in opposition to the commission's factual findings.~~ The appearance before the commission will be scheduled after receipt of the judge's demand for appearance and statement of objections. The commission may request further briefing.



At the appearance before the commission, the judge may appear with or without counsel. The appearance is not an evidentiary hearing and there is no testimony by witnesses. Argument shall be limited to oral presentation not to exceed thirty (30) minutes by the judge and thirty (30) minutes by trial counsel or other attorney designated by the commission to present argument in support of the admonishment.

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### **AMENDMENTS TO POLICY DECLARATION 3.9**

The commission has established the position of legal advisor to commissioners and shall designate an attorney to serve in that capacity. The legal advisor reports directly to the commission and shall assist the commission in its adjudicatory function, including in its consideration and adjudication of matters in which formal proceedings have been instituted and matters in which judges ~~contest~~ demand an appearance before the commission to object to an intended private admonishments or an intended public admonishments.

The legal advisor shall not participate in the investigation of complaints or prosecution of charges against judges. If the legal advisor previously participated in an investigation or adversarial proceeding in another capacity as an attorney for the commission, he or she shall not assist the commission in its deliberations or adjudication of that matter absent a written waiver by the judge.

The legal advisor shall present to the commission proposals for disposition of matters in which formal proceedings have been instituted which have been jointly offered by trial counsel and the judge or judge's counsel. After institution of formal proceedings, the legal advisor shall be responsible for requesting the appointment of special masters by the Supreme Court and shall serve as the commission's liaison to special masters appointed in formal proceedings.

The legal advisor shall perform such additional duties as may be assigned by the commission that do not require or cause the legal advisor to participate in the commission's investigatory or prosecutorial functions.